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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 39

RICHARD HALL and CHRISTINE HALL,
Appellants,

against

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF *AMICUS CURIAE* FOR NEW YORK STATE ATTORNEY GENERAL IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

	PAGE
Interest of *Amicus*	1
POINT I—A durational residence requirement as a prerequisite to voting for presidential and vice presidential electors is a reasonable exercise of the state's power to set voter qualifications	2
Conclusion	10

CASES CITED

Burroughs v. United States, 294 U. S. 534	4
Carrington v. Rash, 380 U. S. 89	3, 8
Cone Brothers Contracting Co. v. NLRB, 235 F. 2d 37 (5th Cir. 1956), *cert. denied* 352 U. S. 916	8
Delaware v. New York, 385 U. S. 895, *cert. denied* 352 U. S. 916	7
Drueding v. Devlin, 234 F. Supp. 731 (D. Md. 1964), *aff'd* 380 U. S. 125	3, 4, 8
Edwards v. California, 314 U. S. 160	9
Golden v. Zwickler, 394 U. S. 103	2
Gray v. Sanders, 372 U. S. 368	3
Gunn v. United States, 238 U. S. 347	3
Harman v. Forssenius, 381 U. S. 528	8
Harper v. Virginia State Board of Elections, 383 U. S. 663	3, 10
Kramer v. Union Free School District, 395 U. S. —	3, 4
Lassiter v. Northampton County Board of Elections, 360 U. S. 45	3, 4
McDonald v. Board of Elections, 394 U. S. 802	4, 8
McPherson v. Blacker, 146 U. S. 1	3

PAGE

Minor v. Happersett, 88 U. S. [21 Wall.] 162 3

Moore v. Ogilvie, 394 U. S. 814 2

Pope v. Williams, 88 U. S. [21 Wall.] 162 3

Shapiro v. Thompson, 394 U. S. 618 9

South Carolina v. Katzenbach, 383 U. S. 301 ..... 3, 9

United Public Workers v. Mitchell, 330 U. S. 75 2

United States v. Classic, 313 U. S. 299 3

United States v. Guest, 383 U. S. 745 9

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Const. Art. I, § 4 3

U. S. Const. Art. II, § 1 ..... 3, 4

U. S. Const. Amend. XII 5

N. Y. Const. Art. II, § 1 6

N. Y. Const. Art. II, § 9 ..... 1, 6

N. Y. Election Law § 150 6

N. Y. Election Law Article 14-a 1

N. Y. Election Law § 340-41 6

N. Y. Election Law § 342(a) 6

N. Y. Election Law § 342(c) 7

N. Y. Election Law § 342(d) 7

N. Y. Executive Law § 63 2

N. Y. Executive Law § 69 2

N. Y. Executive Law § 71 2

MISCELLANEOUS

SCHMIDHAUSER, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823 (1963) 7

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Interest of *Amicus*

The instant case, involving the constitutionality of Colorado's durational residence period as a prerequisite to voting for that state's presidential electors, is of direct interest to the People of the State of New York. New York, by Constitution (Article II, § 9) and statute (New York Election Law, Article 14-a), has established a 90-day residence period for eligibility to vote for presidential and vice-presidential electors. Should appellants succeed in their challenge to durational residence requirements, the problems engendered by such a result would be particularly acute in New York which is the second most populous state in the union, incorporates the most populous

city in the nation and is a traditional host to persons from other parts of the country. The Attorney General of New York as the chief legal officer of the state (New York Executive Law § 63), is charged with the defense of state enactments (Executive Law § 71). He also has a special responsibility with respect to administration of the Election Law (Executive Law § 69). Accordingly, the Attorney General of the State of New York files this brief *amicus curiae* in support of appellees.

POINT I

A durational residence requirement as a prerequisite to voting for presidential and vice presidential electors is a reasonable exercise of the state's power to set voter qualifications.

A.

Appellants concede that a person who offers to vote for presidential and vice-presidential electors must be a resident of the state in which he offers to vote (Br. pp. 18 n. 3[a], 28). They challenge, however, the constitutionality of a requirement that he be a resident for a specific period of time before he becomes eligible to vote in such elections. Appellants appear to acknowledge that *some* length of time as a resident in the state can be required and ask this Court to fix such a period as a constitutional requirement. However, once it is conceded that some residence requirement may be imposed, there is no basis for a suggestion that the Constitution requires a two, three or six week period as opposed to a one or two, three or six month period of residence.*

* It should be pointed out the instant case may be moot since Colorado has altered its residence requirement to two months, a period with which appellants complied. Accordingly, the issues will not recur in their present posture (cf. *Moore* v. *Ogilvie*, 394 U. S. 814) and there is no party aggrieved before this Court. *Gohlen* v. *Zuckler*, 394 U. S. 103; *United Public Workers* v. *Mitchell*, 330 U. S. 75.

In imposing this durational residence requirement, the states are acting pursuant to the explicit authority of the United States Constitution, Article II, § 1, that the state legislatures direct a method of appointing electors for president and vice president. *McPherson* v. *Blacker*, 146 U. S. 1. Indeed, the state legislative power to control the appointment of electors is plenary in contrast to its power to regulate congressional elections. The latter power, while given to the states in the first instance, is subject to some control by Congress. U. S. Const. Article I, § 4; *United States* v. *Classic*, 313 U. S. 299. Because the establishment of voter qualifications is the province of the states (*Harper* v. *Virginia State Board of Elections*, 383 U. S. 663; *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Carrington* v. *Rash*, 380 U. S. 89, 91; *Gray* v. *Sanders*, 372 U. S. 368, 379; *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50 [1959]; *Pope* v. *Williams*, 193 U. S. 621, 632 [1904]; *Minor* v. *Happersett*, 88 U. S. [21 Wall.] 162), examination of the validity of state voting requirements is confined to the question of whether "state voting qualifications or procedures . . . are discriminatory on their face or in practice" (*South Carolina* v. *Katzenbach*, *supra* at 325), within the meaning of either the Fifteenth Amendment (see e.g., *Guinn* v. *United States*, 238 U. S. 347, 366 [1915]) or the qual protection clause of the Fourteenth Amendment (*Harper* v. *Virginia State Board of Elections*, *supra*; *Carrington* v. *Rash*, *supra*).

No prerequisite for voting has received such long-term unqualified sanction as the residence requirement. Such requirements are "obvious examples indicating factors which the state may take into consideration in determining the qualifications of voters". *Lassiter* v. *Northampton County Board of Elections*, *supra* at 51. Residence requirements were directly sanctioned by this Court in *Drueding* v. *Devlin*, 234 F. Supp. 731 (D. Md. 1964), *aff'd* 380 U. S. 125 and *Pope* v. *Williams*, *supra*. Only last term in *Kramer* v. *Union Free School District*, 395 U. S. ——,

this Court, in examining other qualifications for voting in a local school district election, noted that it was applying a rigid scrutiny to "statutes denying the franchise to citizens *who are otherwise qualified by residence* and age. . . ." (Emphasis supplied).

Residence requirements such as the one in the instant case are not to be measured by the standard of whether they further a "compelling state interest" (*Kramer* v. *Board of Elections, supra*), but rather by whether or not they have a rational connection to a valid state purpose. *Lassiter* v. *Northampton County Board of Elections, supra.* This standard is clearly mandated by the decision of this Court in *McDonald* v. *Board of Elections*, 394 U. S. 802, rejecting the claim of an incarcerated prisoner awaiting trial that he was being unfairly denied an absentee ballot. As in that case, the provision here makes no discrimination on the basis of wealth or race and represents an attempt to *extend* the ballot to persons who might otherwise be disenfranchised. The fact that the statute does not cover all persons whom it might cover does not undercut its presumptive validity. Only one state does not provide for any residence requirement and Congress has itself provided a one-year requirement for voting in the District of Columbia. *Drueding* v. *Devlin, supra.*

Residence requirements have traditionally been upheld as furthering the legitimate interests of insuring that a voter is a member of the community in which he offers to vote, and is a member of an informed electorate (*Lassiter* v. *Northampton County Board of Elections, supra*) and in protecting the purity of the election process. *Burroughs* v. *United States*, 294 U. S. 534. Appellants do not dispute the legitimacy of these aims in general, but contend that since the election is national in character, length of residence in any one state is irrelevant and contend further that no appreciable period of time is required to insure the purity of the ballot. Contrary to appellants' contention, the "member of the community" factor is not

irrelevant even in national elections. Although appellants disclaim any intention to mount an attack in this Court on the electoral college system of selecting a president, their argument amounts to just that. This Court is not the forum for such an argument. As of this date, the president is not elected by individuals, but by states. U. S. Const. Art. II, § 1; Amendment XII. It is the electors elected by the voters of each state who determine who shall be president. Accordingly, a vote by a person in a state where that person is not a resident would serve to dilute the votes of the residents of the state, a result not countenanced by the Constitution.

Thus, even though most states now employ the short ballot, which lists the candidates for president and vice president rather than the names of electors and even though there are, indeed, national issues at stake in a presidential election which cut across state boundaries, these interests have been recognized by most states in shortening the period of residence required for voting for president and vice president. However, because voting is still by states, the states have a legitimate interest in protecting the franchise of their voters by insuring that the votes are cast only by persons with some ties to the state.

Appellants' disregard of the importance of the electoral system is most clearly evidenced by their presentation of figures reflecting the numbers of persons who allegedly were disenfranchised by residence requirements and their contention that these numbers would have been enough to change the result in two of our last three presidential elections. No attempt was made to analyze those figures in terms of the states in which those votes would have been cast and there is no demonstration that the results could have been changed at all. There are local and state interests at stake even in a national election which more than justify residence requirements. This is a fact of life clearly recognized in every campaign where candidates are,

almost without exception, chosen with a view to the area if not the state from which they come.

Not only do appellants totally ignore the electoral college system of selecting a president by states, but the result they argue for would make any efficacious registration procedures virtually impossible.

Whatever Colorado may provide with respect to special presidential ballots in terms of requiring registration only by the Friday before an election, a state like New York which provides that a special presidential ballot must be applied for no later than the fourth Tuesday prior to the general election (New York Election Law § 342) obviously has come to the legislative conclusion that at least that much time is needed to insure the purity of the ballot and to set up administrative procedures.* There would appear to be no constitutional difference between the nearly 30 days now provided by New York for registration for a presidential ballot and the 90-day residence requirement. In any event, not all of the possible applications for such ballots would be made at the last possible moment but between the 90 days prior to the election and the fourth Tuesday.

New York not only has the second largest population in the country and the largest city in the country, it also has one of the most mobile and fluctuating populations, being a traditional mecca for new residents and a center for transients from all parts of the country and indeed of the world. Thus, the possibility that there will be in New

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* The New York special provisions for voting for presidential electors are found in N. Y. Const. Art. II, § 9 and N. Y. Election Law §§ 340-41. These provide for eligibility to vote after residence in the State for ninety days. In 1967, the prior one year requirement for voting in other elections was amended to provide for eligibility after a three month residence in the State and County, City or village of residence. N. Y. Const. Art. II, § 1; N. Y. Election Law § 150.

York, on any given election day or in the few days preceding it, a vast number of non-residents is highly likely.

It would be physically impossible to screen such persons if they chose to offer to vote in New York just before any election. Therefore, the possibilities of double voting and of voting by non-residents would be extremely high and the possibility of unscrupulous abuse of the electoral process by the bringing in of numerous unregistered voters not at all theoretical. This is especially true under a system of voting by states since a small number of votes could alter the result in a state.* Indeed, this kind of fear was the genesis of many residence requirements, SCHMIDHAUSER, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823, 828 (1963). The fact that no such abuse can be pointed to in the present day merely demonstrates that the requirements have served a useful purpose, not that they are not necessary.

Appellants suggest that the fact that a special presidential ballot must be applied for under oath with the sanction of perjury is sufficient to insure the purity of the ballot and that, therefore, no prior investigation is required. Certainly it is better to conduct any investigation before a ballot is issued than subsequently; an investigation requiring time is required for its conduct and for notifying a prior election district that application has been made in the new state. See New York Election Law § 342(e). In New York all investigations of a person offering to vote in a presidential election must be concluded by the seventh day before the election. Election Law § 342(d). The remaining time must be used in preparing lists and sending ballots so that they may be cast

* Abolition of the unit rule would not cure this problem but would merely limit it to some extent. In any event, the method of allocating electoral votes is not the issue here. See *Delaware v. New York*, 385 U. S. 895.

in time for the election. This administrative machinery is not unduly cumbersome. It is designed to protect purity of the ballot and is not at all calculated to prevent people who are eligible to vote from voting. The chaotic results of the abolition of the residence requirement purely from the administrative standpoint alone justify the imposition of such requirement. When coupled with the possibility of fraud the residence requirement obviously justifies the reasonable and, indeed, compelling state interest of having orderly elections free from abuse. *Cone Brothers Contracting Co.* v. *NLRB*, 235 F. 2d 37, 40 (5th Cir. 1956), *cert. denied* 352 U. S. 916.

Appellants suggest, as an alternative to a residence requirement, that they be permitted to establish residence based on the ties they form with the community which include taking employment, motor vehicle registration, school enrollment and other indicia of residence. This argument derives from the decision of this Court in *Carrington* v. *Rash*, 380 U. S. 89 (1965), decided the same day as *Drueding* v. *Devlin, supra*. *Carrington* provides no support for the suggestion. In the first place, petitioners in that case had more than satisfied the durational residence requirement of Texas and were seeking to rely on their roots in the community, established over that period of time to refute a statutory presumption that their military status made their ties dubious. Such limited use of the indicia of property does not support the constitutional requirement that they may be a substitute for durational residence requirements. Indeed, the whole concept that property and means qualifications be used to establish eligibility to vote is anathema to that right. *McDonald* v. *Board of Elections, supra; Harman* v. *Forssenius*, 381 U. S. 528. Moreover, the property investigation suggested by appellants would, on any large scale, consume at least as much time as a residence requirement itself and would in effect create a dual requirement for voting not presently contained in the law. Finally, many persons

move from one place to another without appreciable means of property and without the means to establish immediate objective roots in the area. They cannot afford cars or houses; they may not have children of school age; they may not take residence under a lease and would thus be unable to demonstrate residence except by length of stay.

The residence requirement as presently constituted, thus, is reasonably related to the legitimate state interests it is designed to further. There has been no suggestion that the requirement has been applied in any discriminatory fashion (*South Carolina* v. *Katzenbach, supra*).

B.

Appellants seek to bolster their attack on the residence requirement for voting by arguing that such requirement abridges their fundamental right to travel. This argument derives solely from the decision of this Court in *Shapiro* v. *Thompson*, 394 U. S. 618, and is designed to fall within the terms of that case. This procrustean effort is unavailing. It is hardly likely in the first place that the right to travel is more fundamental than the right to vote. The residence requirement which is directed by its terms solely to the franchise for reasons legitimately bearing on the exercise of the franchise can not be undercut because of an alleged tangential impact on another "right". The unyielding one year residence requirement struck down by this Court in *Shapiro* v. *Thompson* was found by this Court to have the explicit purpose of fencing out from the state a certain class of people. Other cases based on the right to travel have struck down provisions passed for the same reason. *Edwards* v. *California*, 314 U. S. 160; *United States* v. *Guest*, 383 U. S. 745, 757. There is no possibility of finding any such intention, expressed or implied, in the voter residence statutes. The attempt to find an indirect impairment of one right as a justification for overthrowing a valid requirement relating to another,

equally fundamental right. As untenable and, applied here, would be drastic violence to the whole structure of our existing electoral system.

C.

Similarly, the attempt by amicus Civil Liberties Union to characterize the right to vote as a First Amendment right and, therefore, somehow even more fundamental than this Court has declared it to be is an attempt to do indirectly what clearly cannot be done directly. These claims are not within the issues tendered by the parties and amicus cannot enlarge those issues. In any event, the arguments are equally untenable. While the right to vote is clearly related to First Amendment freedoms of speech and association, it is not one of those rights. Indeed, there are many valid instances of persons unable to vote for one reason or another whose right to free speech and free assembly cannot be infringed. See *Harper v. Virginia State Board of Elections*, 383 U. S. 663, 673 (Black, J., dissenting).

CONCLUSION

For the foregoing reasons the order of the District Court should be affirmed.

Dated: New York, New York, September 23, 1969

Respectfully submitted,

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